Ms Jones and Mr Kernott were an unmarried couple whose purchase of a house in 1985 generated a dispute that has (thus far) reached the Court of Appeal. The parties acquired the property in joint names, apparently unaware of the legal consequences of doing so. Everybody agreed that the parties held the property beneficially in equal shares when they separated in 1993. That consensus is unsurprising given Stack v. Dowden [2007] UKHL 17, [2007] 2 A.C. 432, and its invocation of a presumption that equity follows the law where there is no express declaration of trust and a common intention constructive trust is asserted in a domestic context. The dispute in Jones v. Kernott was generated by Ms Jones's continued occupation of the property (with the couple's two children) after separation and her assumption of sole responsibility for the mortgage and other outgoings during that period. Only in 2006 did Mr Kernott formally seek payment of his half share. By the time he purported to sever the joint tenancy in 2008, Ms Jones had already instituted proceedings asserting the existence of an "ambulatory" constructive trust by virtue of an unarticulated agreement that the property was no longer held in equal shares by the date of the hearing, such that she now owned the entire beneficial interest.

There is ambiguity as regards the means by which a litigant can legitimately rebut the Stack presumption. One aspect of that question (confused by the majority's indiscriminate terminological usage in Stack) is whether a court can impute a common intention to the parties (rather than simply infer that such an intention existed). This would involve attributing to the parties an intention that they may not actu- ally have held.

In the County Court, Judge Dedman decided that the property should be divided as to 90% for Ms Jones and 10% for Mr Kernott. While examining the whole course of dealings between the parties in relation to the property in order to establish their common intention regarding its ownership, purporting to apply both Oxley v. Hiscock [2004] EWCA Civ 546, [2005] Fam. 211 and Stack, the judge was in- fluenced by the fact that Ms Jones had received no contribution from Mr Kernott towards the mortgage and little towards the children's upbringing for 14 years. Indeed, until 2006, he concluded, Mr Kernott had shown no intention of availing himself of any beneficial interest in the property.

Mr Kernott's appeal to the High Court was dismissed ([2009] EWHC 1713 (Ch), [2010] 1 All E.R. 947). Deputy Judge Nicholas Strauss Q.C. held that, following Stack, the court was free to impute a common intention, and that where the parties' intention could not be deduced from words or conduct, imputation was likely to depend on the court relying on what it considered to be fair.

The Court of Appeal ([2010] EWCA Civ 578, [2010] 1 W.L.R. 2401) reversed the judgment below and held that the parties shared the property equally in equity. Wall L.J. concentrated on the question whether the property was still held in equal shares, rather than the precise allocation of interests if it was not. He held that the Court's previous decision in Oxley (concerning a property held in the sole name of one party) provided "a platform" that could facilitate the dismissal of this appeal, because of its emphasis on fairness given the whole course of dealing between the parties (at [31]). The key question was whether the House of Lords' subsequent decision in Stack, which em- phasised common intention rather than the court's view of fairness, necessitated a different approach. Wall L.J. felt compelled to start from Baroness Hale's contention that a conveyance into joint names at law meant joint beneficial interests except in unusual circumstances. Given that premise, he found insufficient evidence from which he could infer a common intention to vary the shares, and he seemingly felt unable to impute such an intention. Even the combination of the passage of time, Mr Kernott's alternative accommodation and Ms Jones' payment of outgoings could not displace those original beneficial entitlements. The most he could find was "an agreement by the appellant to defer re- alisation for a number of years" (at [62]), which actually crystalised the 50% shares. Despite his earlier conclusion on Oxley, Wall L.J. held that there was "no tension" between Oxley and Stack in their application to the facts of Jones because of the transfer into joint names (at [59]).

In his concurring but firmer judgment, Rimer L.J. offered an eloquent critique of the majority's approach in Stack. He considered the process of imputing an intention inconsistent with Baroness Hale's "emphasis that the burden of rebutting the presumed joint beneficial interest is heavy" and would rarely be discharged (at [77]). Rimer L.J. was therefore forced to conclude that the majority in Stack did not allow intentions to be imputed rather than inferred. Like Wall L.J., he found no basis on which the judge could properly decide that the par- ties intended their shares to vary after separation. Moreover, he re- jected any suggestion (following Stack) that the

judge could simply impose a solution that he considered “fair” even where evidence of the parties’ true common intention was sparse.

Jacob L.J. briefly dissented. Although he acknowledged that Judge Dedman had referred to deciding what was “fair and just”, Jacob L.J. observed that the remark was made amongst repeated references to the importance of discerning the parties’ intentions. Since the judge had therefore applied the correct test and reached a conclusion that was not perverse, Jacob L.J. found no basis for interference.

All of the judges deciding Jones could be criticised for referring too often to Oxley given the House of Lords’ apparent attempt to refine its approach. But the differing conclusions they reached to an extent re- flect contradictions inherent in Stack. While the County Court and High Court judges were content to consider the myriad factors that might be relevant in discerning the parties’ true common intention and the possibility of imputing to them an intention based on what is fair, the majority of the Court of Appeal were conclusively influenced by the strong presumption that equity follows the law and the rejection of an approach based on fairness alone.

Wall L.J. issued a familiar and justifiable plea to cohabitants and their legal advisors to “address the unthinkable”, i.e. to “address their minds to the size and fate of the respective beneficial interests on ac- quisition, separation and thereafter” (at [61]). Nevertheless, it is equally appropriate to plead that the Supreme Court, when it hears Jones, clarifies the correct approach where evidence of a common intention is equivocal at best.

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